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Kemacahaya Development Sdn Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Ors and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(A)-45–01 OF 2018 AND B-02(A)-46–01 OF 2018
HAMID SULTAN, MARY LIM AND HASNAH HASHIM JJCA
22 JULY 2019

C

Civil Procedure — Appeal — Appeal to Court of Appeal — Whether direction or advice given by High Court to liquidator under s 237(3) of the Companies Act 1965 (or s 487(3) of the Companies Act 2016) was an administrative proceeding by way of direction and was non-appealable — Whether such direction/advice was not a judgment or order under s 67 of the Courts of Judicature Act 1964

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Kemacahaya Development Sdn Bhd ('Kemacahaya') entered into an agreement with Masterskill (M) Sdn Bhd ('Masterskill') to develop a piece of land for Masterskill's new campus. Masterskill discovered that Kemacahaya owed a substantial amount in unpaid water bills ('the debt') to Syarikat Bekalan Air Selangor Sdn Bhd ('SYABAS'). Masterskill entered into an agreement with SYABAS whereunder it paid RM800,000 to SYABAS to be held in an interest-bearing account subject to the performance by SYABAS of certain conditions. SYABAS, meanwhile, sued Kemacahaya and obtained summary judgment against it in respect of the debt. Thereafter, SYABAS filed its proof of debt in Kemacahaya's winding up. Kemacahaya's liquidator filed an application pursuant to s 237(3) of the Companies Act 1965 and/or s 487(3) of the Companies Act 2016 to seek directions from the High Court as to who was the rightful owner of the RM800,000 which was paid by Masterskill to SYABAS on behalf of another company ('Pywatec'). The High Court made several findings in respect of the liquidator's application including that the liquidator could not claim the RM800,000 from SYABAS. In the instant appeal by the liquidator against the High Court's decision, SYABAS raised a preliminary issue that the High Court's decision was not appealable based on the Federal Court's decision in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 which held that a direction or advice given by the Court under s 237(3) of the Companies Act 1965 — which was similar to s 487(3) of the Companies Act 2016 — was neither a judgment nor an order.

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Held, striking out the appeals herein and setting aside the High Court's decision pursuant to s 69 of the Courts of Judicature Act 1964:

(1) This court was bound by the Federal Court's decision in *Ooi Woon Chee* that a direction given pursuant to s 237(3) of the Companies Act 1965

('the CA') was an administrative proceeding by way of a direction and did not fall within s 67 of the Courts of Judicature Act 1964 and was non-appealable (see para 16).

(2) The High Court judge in the instant case had made findings as opposed to giving directions or advice on administrative matters as envisaged by s 237(3) of the CA. The directions that were sought were outside the purview of s 237(3) (see para 16).

(3) The liquidator's application was misconceived in that the asset which he sought directions over was not in his custody. Given that the RM800,000 — the subject of the appeals — was not in the liquidator's custody, ie, not in the hands of the wound up company, Kemacahaya — the liquidator had no legal right over the said sum that was paid by Masterskill to SYABAS (see para 17).

[Bahasa Malaysia summary

Kemacahaya Development Sdn Bhd ('Kemacahaya') telah memasuki perjanjian dengan Masterskill (M) Sdn Bhd ('Masterskill') bagi memajukan sebidang tanah untuk kampus baru Masterskill. Masterskill mendapati bahawa Kemacahaya berhutang sejumlah besar bila air yang tidak dibayar ('hutang tersebut') kepada Syarikat Bekalan Air Selangor Sdn Bhd ('SYABAS'). Masterskill telah memasuki perjanjian dengan SYABAS yang mana ia telah membayar RM800,000 kepada SYABAS untuk dipegang dalam akaun berfaedah tertakluk kepada pelaksanaan syarat-syarat tertentu oleh SYABAS. SYABAS, sementara itu, telah menyaman Kemacahaya dan memperoleh penghakiman ingkar terhadapnya berkaitan hutang tersebut. Berikutan itu, SYABAS telah memfailkan bukti hutangnya dalam penggulungan Kemacahaya. Pelikuidasi Kemacahaya telah memfailkan permohonan menurut s 237(3) Akta Syarikat 1965 dan/atau s 487(3) Akta Syarikat 2016 untuk memohon arahan daripada Mahkamah Tinggi berhubung siapa pemilik berhak RM800,000 yang dibayar oleh Masterskill kepada SYABAS bagi pihak syarikat satu lagi ('Pywater'). Mahkamah Tinggi telah membuat beberapa dapatan berkaitan permohonan pelikuidasi termasuk bahawa pelikuidasi tidak boleh menuntut RM800,000 tersebut daripada SYABAS. Dalam rayuan ini oleh pelikuidasi terhadap keputusan Mahkamah Tinggi, SYABAS telah menimbulkan isu awalan bahawa keputusan Mahkamah Tinggi tidak boleh dirayu berdasarkan keputusan Mahkamah Persekutuan dalam kes *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 yang memutuskan bahawa satu arahan atau nasihat yang diberikan oleh mahkamah di bawah s 237(3) Akta Syarikat 1965 — yang sama seperti s 487(3) Akta Syarikat 2016 — bukan suatu penghakiman atau pun perintah.

Diputuskan, membatalkan rayuan-rayuan ini dan mengetepikan keputusan Mahkamah Tinggi menurut s 69 Akta Mahkamah Kehakiman 1964:

(1) Mahkamah ini terikat oleh keputusan kes *Ooi Woon Chee* bahawa suatu arahan yang diberikan menurut s 237(3) Akta Syarikat 1965 ('Akta') adalah suatu prosiding pentadbiran melalui arahan dan tidak terjatuh di bawah s 67 Akta Mahkamah Kehakiman 1964 dan tidak boleh dirayu (lihat perenggan 16).

(2) Hakim Mahkamah Tinggi dalam kes ini telah membuat dapatan sebaliknya dan bukan memberikan arahan atau nasihat berhubung hal pentadbiran sebagaimana termaktub dalam s 237(3) Akta. Arahan yang dipohon adalah di luar skop s 237(3) Akta (lihat perenggan 16).

(3) Permohonan pelikuidasi disalah tanggap di mana aset yang dia mohon arahan bukan di bawah jagaannya. Berdasarkan RM800,000 itu — hal perkara rayuan-rayuan tersebut — bukan di bawah jagaan pelikuidasi, iaitu, bukan dalam pegangan syarikat yang dalam penggulungan, Kemacahaya — pelikuidasi tiada hak undang-undang ke atas jumlah tersebut yang dibayar oleh Masterskill kepada SYABAS (lihat perenggan 17).]

Notes

For cases on appeal to court of appeal, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 983–999.

Cases referred to

Blackbird Pies (Management) Pty Ltd (No 2), Re [1970] QWN 14 (refd)
K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 CLJ 793, FC (refd)
Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713; [2012] 2 CLJ 501, FC (folld)
Securitibank Ltd, Re [1978] 2 NZLR 133, CA (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 38, Form 33
Companies Act 1965 ss 235(2), 237, 237(3)
Companies Act 2016 s 487, 487(3)
Courts of Judicature Act 1964 ss 67(1), 69

Appeal from: Civil Suit No 22C-41–07 of 2016 (High Court, Shah Alam)

Wong Rhen Yen (Siti Mardhiyyah Zamani and Gary Ng Cheng Yip with him) (Dennis Nik & Wong) for the appellant.
Rewathy K Kutty (Sharuni a/p Tarmaraja with him) (Rastam Singa & Co) for the first respondent.
Mohd Nor Md Deros (Ramesh & Loo) for the second respondent.
(Ming, Yee & Co) for the third respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] There are two appeals emanating from one judgment arising from the decision of the High Court delivered on 21 November 2017 giving directions pursuant to s 237(3) of the Companies Act 1965 ('the CA 1965') and/or s 487(3) of the Companies Act 2016 ('the CA 2016'). As the facts are similar it was agreed by all the parties that the appeals be heard together. After considering the submissions of counsels in respect of the preliminary issue, we delivered our decision. It was our unanimous decision to strike out the appeals pursuant to this court's powers under s 69 of the Courts of Judicature Act 1964 ('the CJA').

[2] The background facts of the appeals are important to understand the context in which the appeals were brought.

FACTUAL BACKGROUND

[3] Kemacahaya Development Sdn Bhd ('Kemacahaya') (the appellant in Appeal B-02(A)-45–01 of 2018) through its liquidator filed a form of summons dated 17 May 2017 seeking directions from the High Court pursuant to s 237(3) of the CA 1965 and/or s 487(3) of the CA 2016. Kemacahaya sought for the High Court's directions as to the rightful owner of the sum of RM800,000 paid by Masterskill (M) Sdn Bhd ('Masterskill') on behalf of Pywatec (M) Sdn Bhd ('Pywatec') to Syarikat Bekalan Air Selangor Sdn Bhd ('SYABAS') as stakeholders (the appellant in B-02(A)-45–01 of 2018).

[4] Sometime in 1999, Masterskill approached Kemacahaya to develop a piece of land held under PT 5707, HS(M) No 04900, Mukim Ulu Langat, Negeri Selangor to house its new campus. Upon the execution of a sale and purchase agreement dated 11 November 1999, Masterskill discovered that there was an outstanding bill of RM672,313.50 owed by Kemacahaya to SYABAS. Masterskill then proposed to pay the sum of RM800,000 to SYABAS to be held in an interest bearing account and subject to certain terms.

[5] The sum of RM800,000 was paid by Masterskill to SYABAS pursuant to an agreement dated 31 March 2010 between Masterskill and SYABAS. The parties agreed that SYABAS will install separate individual water meters in order for Masterskill to receive direct supply of treated water. SYABAS will then release a letter of no objection to facilitate Masterskill in the extraction of the certificate of fitness for occupation for its auditorium.

[6] SYABAS initiated a civil action against Kemacahaya for the outstanding water bill. Summary judgment was entered against Kemacahaya on 19 August

2016 for the sum of RM615,894.52. Based on the summary judgment SYABAS filed a proof of debt ('POD') dated 18 January 2017 with the liquidator for the balance of the outstanding sum.

[7] In the intervening period, Kemacahaya was wound up pursuant to a winding up order dated 10 December 2012 vide Winding-Up Petition No 28–365–09 of 2012. A liquidator was appointed to administer the affairs of Kemacahaya. Through the liquidator, Kemacahaya filed the application pursuant to s 237(3) of the CA 1965 and/or s 487(3) of the CA 2016. Section 237 of the CA 1965 and s 487 of the CA 2016 are similar provisions which defined the exercise and control of the liquidator's powers. Section 237 of the CA 1965 reads:

> (1) Subject to this Part the liquidator shall in the administration of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection.
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> (2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.
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> (3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.
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> (4) Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

[8] Section 437(3) of the CA 2017 is similar with s 237(3) of the CA 1965:

> (3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

THE HIGH COURT'S DECISION

[9] The learned High Court judge's findings can be summarised as follows:

(a) SYABAS is entitled to the sum paid by Masterskill as they have obtained summary judgment for the said sum and have filed POD;

(b) Masterskill confirmed that they are not disputing the payment to SYABAS;

(c) the liquidator cannot claim from SYABAS as the sum was paid by Masterskill; and

(d) SYABAS is not a stakeholder. If at all, SYABAS is a constructive trustee who had received a sum of RM800,000 for which the judgment sum is RM739,205.76.

PRELIMINARY ISSUES

[10] Learned counsel for SYABAS raised the following preliminary issue for this court's consideration:

(a) the decision appealed against is not appealable in law; and

(b) the doctrine of election and estoppel operates against Kemacahaya.

[11] Parties were then directed by this court to further submit on the jurisdictional point, that is, whether the decision by the High Court judge made pursuant to s 237(3) of the CA 1965 is appealable. Section 67(1) of the Courts of Judicature Act 1964 ('the CJA') provides that the Court of Appeal shall have jurisdiction to hear and determine appeal from any judgment or order of any High Court in any civil cause or matter. Learned counsel for SYABAS highlighted the Federal Court's case of *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501 where the Federal Court held that a direction given under s 237(3) of the CA 1965 is neither a judgment nor an order.

[12] Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court in *Ooi Woon Chee* made specific reference to s 237(3) of the CA 1965 said:

> [53] We are of the view a direction or advice given under s 237(3) of the Act is not a judgment or order. In *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)* (1989) 7 ACLC 1270, the court in considering the nature of application for directions under s 379(3) of the Companies (Queensland) Code which is similar to our s 237(3) of the Act held at p 1273 that a direction given under similar provisions is not a 'judgment' or 'order'. The court followed *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] Qd R 33 wherein it was held:
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> > That subsection (s 237(3)) does not, in my opinion enable the court to make binding orders on persons in the nature of judgments. The directions which a court may give on an application under it are more like the directions or advice which may be given under s 45 of the Trustees and the Executors Acts. Such directions are not in my opinion, subject to appeal. (*Re Tooth's Trusts* [1877] 5 QSCR 10). I have set out these views on s 237(3) because it was contended that the decision of WB Campbell J created an estoppels between the parties. But there was no judgment and no order. In my opinion there was no estoppels. Nor was there any right of appeal.
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> [54] The rationale or the purpose of s 237(3) of the Act is to enable a liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up. This reasoning has been followed in several

Australian decisions. In *Re Security Provident Fund Limited (in liq); Rodger v Gourlay* (1984) 2 ACLC 594 at p 595 the Australian Supreme Court ruled that: A

> The major matter is that the question asked in the summons (or at least questions 1 and 2) are outside the scope of liquidators' summons for directions. It is clear, upon authority, that sub-s 379(3) does not enable the Court to make binding orders in the nature of judgment ... B
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> The function of a liquidators' summons for directions is to give him advice as to his proper course of action in the liquidation; ...

In *Re JW Murphy & PC Allen* (1996) 19 ACSR 569, the Supreme Court of New South Wales held at p 570: C

> an application for directions under s 379(3) of the Companies Code (or s 479(3) of the Corporation Law) is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up. D

[13] Directions pursuant to s 237(3) of the CA 1965 are described as 'administrative non-adversary proceeding'. Therefore, the direction given by the High Court does not fall within s 67 of the CJA and is non-appealable. E

[14] In response, learned counsel of Kemacahaya argued that there are subsequent authorities departing from the principle expounded in *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14. Learned counsel relied on the case of *Re Securitibank Ltd* [1978] 2 NZLR 133 where the Court of Appeal of New Zealand which had distinguished the case of *Blackbird*: F

> A decision of the Supreme Court under s 241(3) is, in its terms, a direction to the liquidator. It is not simply an opinion for his guidance for his guidance which he is fee to follow, or ignore, as he chooses. It is binding on him. In certain contexts, 'order' and 'direction' are interchangeable terms (*Benson v Benson* [1941] P90 at p 97; [1941] 2 All ER 335 at p 340–341. In my judgement, and with the greatest respect to the contrary view reached by Hanger J in *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14 at p 35, this is the position where directions are given to a liquidator under s 241(3) of the Companies Act and such directions constitute an order of the Supreme Court which is appealable under s 66 of the Judicature Act 1908. G H

[15] Learned counsel submitted that the nature of directions given by the High Court judge are directions that are binding on the liquidator and not just an opinion for the liquidator's guidance where he has the option whether to comply or not. The High Court judge had made a binding order of which the liquidator is bound to follow. I

A OUR VIEW

[16] By virtue of the doctrine of stare decicis we are bound by the decision of the Federal Court in *Ooi Woon Chee* that a direction pursuant to s 237(3) of the CA 1965 is an administrative proceeding by way of a direction, and does not B fall within s 67 of the CJA and is non-appealable. However, as is obvious from the grounds of decision the learned judge had made findings as opposed to giving directions or advice on administrative matters, envisaged by s 237(3) of the CA 1965, the directions sought were outside the purview of s 237(3) of the C CA 1965. We had further considered the submissions of the parties and we were nevertheless of the view that the application by the liquidator pursuant to s 237(3) of the CA 1965 and/or s 487(3) of the CA 2016 is in the first instance itself is a misconceived application, in that the asset which the liquidator sought direction for is not in his custody.

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[17] Given that the RM800,000, the subject of the appeals, is not in the liquidator's custody, that is, not in the hands of the wound up company Kemacahaya, the liquidator has no legal right over the sum of RM800,000 paid by Masterskill to SYABAS. The law does not allow the liquidator to make E application in respect of asset not in his custody, that is, not in the hands of the wound up company.

[18] In *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; F [2005] 1 CLJ 793, the appellant was a court appointed liquidator of Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') that was wound up. The second respondent were the receivers and managers of KCL appointed earlier under a debenture created by KCL and held by the first respondent. The appellant issued a notice in Form 33 under the Companies (Winding-Up) G Rules 1972 ('the 1972 Rules') demanding the return of KCL's property in the second respondent's possession. This was rejected. The appellant then commenced an action or declarations that the debenture and the appointment of the second respondent was null and void. The appellant also sought for the return of the charged assets that were all movable assets from the second H respondent whilst that action was still pending. In the interim period, the appellant commenced an action pursuant to r 38 of the 1972 Rules and s 235(2) of the CA 1965 for directions as to the future conduct of KCL's winding up.

I **[19]** The main issue before the Federal Court in *K Balasubramaniam* was whether the respective rights of the second respondent as receiver and manager appointed under the debenture and that of the appellant as the court appointed liquidator existed independently of the other or whether the said rights merged following the winding up of KCL.

[20] Siti Norma Yaakob FCJ delivering the judgment of the court said:

> The appellant's reliance on s 237(3) is also misplaced as the scope of that section is confined to guidance on matters of law or principle and not on commercial decisions. The purpose of his getting the order is to enable him to file a suit against the first respondent to recover two sums of money totalling RM9.745m which he maintains had been wrongly paid by KCL to the first respondent and which should be returned to him as the liquidator. From the very nature of the suit to be filed, the decision to commence such a proceeding is very much a commercial decision. In *Sanderson v Classic Car Insurance Pty Ltd* [1985] 10 ACLR 115, the Supreme Court of New South Wales had to consider the scope of s 379(3) of the Companies Code which is in pari materia with our s 237(3). At p 116 of the report, Young J had this to say: 'Although s 379(3) of the Companies Code is expressed in wide terms, it seems clear that it does not permit the liquidator or a provisional liquidator to come to the court whenever he feels some unease about a situation and wishes to obtain some sort of insurance against the possibility of error as well as an assurance that he is on the right track'. That Australian case also listed the following four classes of cases where s 379(3) is applicable.
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> (a) guidance to the liquidator on matters of law; see eg *Re Australian Home Finance Pty Ltd* [1956] VR 1 and; *Re Standard Insurance Co Ltd* [1963] 80 WN (NSW) 1355;
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> (b) questions involving legal procedure (eg whether a liquidator should settle curial proceedings, and if so, on what terms);
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> (c) whether a liquidator should act on his commercial judgment to postpone a sale because he recognises his legal duty ordinarily requires him to reduce the company's assets into cash as soon as possible and to distribute (an example is *Re Statewide Investments Ltd*); or
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> (d) where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the liquidator has acted mala fide or in an absurd or unreasonable or illegal way, see *Re Bayswood Ptd Ltd* [1981] 6 ACLR 107 at p 113.

CONCLUSION

[21] Both parties agreed to leave it to this court to make the necessary orders. Premised on the aforesaid reasons and in all the circumstances of the case, pursuant to our powers under s 69 of the CJA we set aside the order of the High Court dated 21 November 2017. We struck off both the appeals and ordered no costs for here and below. We further ordered the refund of the deposit.

Order accordingly.

Reported by Ashok Kumar